

AG-10-19-89

TF:4
L

ATTACHMENT A

11
14 . V
@l-

'@14
1989

@
i.,
. 9.' % . - 1% . - , . , . , . c
it' . -

Iblal

ASST ATTY GEN

COMMONWEALTH of VIRGINIA

Niary Sue Terry

.. ... @.i.

@ Lje a.tecier

Office of the Attorney General

cia.'s G.lht,o

October 19, 1989

/o/ ...)

I

G2.I Stati.ng matitall r@c-c-a.

. -Z 1: .@

-VAlter A A. -

,@genoe. u moseninal

3,@ -t'a

P-D.-C--Za,etv -.

ootootan Lo@e-oryant

The Honorable John G.'Dicks, III Member,
House of Delegates P.O. Box 247
Chesterfield, Virginia 23832

My dear Delegate Dicks:

You ask two questions concerning the vested rights of a landowner (the "owner") whose real property may be affected by regulations adopted on September 20, 1989, by the Chesapeake Bay Local Assistance Board (the "Board") pursuant to the Chesapeake Bay Preservation Act, SSI.10.1-2100 through 10.1-2115 of the Code of Virginia (the "Act"). With respect to a detailed fact situation, you ask (1) whether the owner has a vested right under existing law to construct a single family home on each lot he has developed even if the requirements in the Board's regulations otherwise would preclude such development, and (2) whether a purchaser for value of a developed lot succeeds to whatever vested property rights the owner may have.

Facts

The owner acquired approximately 235 acres of unimproved land on December 30, 1986. This property was rezoned by the county board of supervisors on January 15, 1987, from an agricultural zoning classification to a conditional residential classification for townhouses and single family residences. The owner, by proffer, limited the density of the development to 290 single family residences and 50 townhouses.

The owner received a number of county approvals and permits, as well as some state and federal permits, for the development, which was designed as a planned residential community. The owner recorded a series of ten subdivision plats between May 14, 1988 and May 23, 1988. The plats were recorded pursuant to the county's subdivision ordinance, after approval by the county's subdivision agent, as required by 99 15.1-473(b) and 15.1-475. The recorded plats divided the property into 267 single family residential lots, with additional recreational and open spaces.

On June 9, 1988, the owner and the county entered into a subdivision agreement pursuant to which the owner agreed to locate and construct all physical improvements in accordance with the county's subdivision ordinance and with plans approved by the county. The owner posted a \$1,900,000 performance bond to secure the completion of the designated improvements.

The owner and the county entered into a water agreement on September 28, 1988, pursuant to which the county agreed to provide water to the development at the owner's expense, and the owner agreed to construct the necessary facilities to provide water in reliance upon the county's agreement to assume responsibility for the operation and maintenance of such facilities. On January 28, 1988, the county granted the owner a land disturbing permit bonded at \$74,000. In addition, on February 18, 1988, the county granted the owner a conditional use permit to locate a yacht club, marina and miscellaneous recreational uses and facilities within the development.

On October 14, 1987, the owner borrowed \$6,400,000 to finance this entire development and, on April 27, 1989, borrowed an additional \$1,500,000. During the spring of 1989, the owner substantially completed the development's infrastructure so that all lots were ready for sale and subsequent construction. You state that the owner has spent more than \$8 million preparing the development for the construction of single family residences and related amenities, including roads, water and sewer systems, and recreational facilities.

Since late in 1987, the owner has sold 180 lots, an additional 20 lots are under contract, and 67 lots remain unsold. The owner believes that 26 of the sold or contracted lots, and 41 of the lots that remain to be sold, are within the probable boundaries of the Chesapeake Bay Preservation Areas which the Board's regulations require the county to designate. The owner also believes that, if the vegetated buffer requirements contained in the Board's regulations apply to these 67 lots, many will no longer contain a viable building site, and some may contain no building site at all.

II- Applicable Statutes and Regulations

The Act was passed by the 1983 Session of the General Assembly and became effective on July 1, 1988. The Act itself effects no zoning change, but it does require the Board to adopt regulations that (1) establish criteria for use by local governments to designate Chesapeake Bay Preservation Areas and (2) establish criteria for local governments to use in deciding requests to rezone, subdivide, or to use and develop land in such areas. See 5 10.1-2107. The Act also provides, in 9 10.1-2115, that its provisions 'shall not affect vested rights of any landowner under existing law.'

On September 20, 1989, the Board completed its adoption of the Chesapeake Bay Preservation Area Designation and Management Regulations, VR 173-02-01 (the 'Regulations'). See 6:1 Va. Regs. Reg. 11-24 (Oct. 9, 1989). Pursuant to 9 2.2 of these Regulations, Tidewater localities will have until September 20, 1990, to designate Chesapeake Bay Preservation Areas and to adopt performance criteria for these areas that satisfy the requirements of Part IV of the Regulations. *Id.* at 14. The change of zoning required by the Act, therefore, is not yet in force and is not required to be in force before September 20, 1990.

The Regulations also require that Chesapeake Bay Preservation Areas normally include a buffer 100 feet landward of tidal shores and certain other sensitive land features. Id. § 3.2(B)(5), at 15. In small lots, or in lots with an unusual configuration, it may not be possible to preserve the 100 foot buffer and still have a viable building lot.

The Regulations further provide for special or hardship exceptions. Section 4.3(B)(2) permits a reduction in the buffer width to not less than 50 feet, when necessary, to prevent the loss of a buildable area on a lot recorded before October 1, 1989, the effective date of the Regulations, provided the modifications are the minimum needed to achieve a reasonable buildable area, and, if possible, an equivalent area on the lot is established to maximize water quality protection. Id. at 18. Section 4.5(A)(1) of the Regulations authorizes local governments to establish an administrative procedure to waive or modify the criteria for structures on legal nonconforming lots, provided there will be no net increase in nonpoint source pollutants and the erosion and sediment control requirements are satisfied. Id. at 19. Section 4.6 authorizes exceptions to the criteria, provided that the exceptions are the minimum necessary to afford relief and that they are reasonably and appropriately conditioned in light of the purpose and intent of the Act. Id. at 20.

III. Vested Rights Determination Requires Government Approval and Substantial Expense in Reliance on Approval

Any determination of vested rights of a landowner depends upon the facts of each particular case. The doctrine of vested rights, sometimes referred to as "equitable estoppel," operates to reconcile the conflict between legislation enacted to provide for society's changing needs and the stability a developer or owner needs to plan and complete a project successfully. In addition to § 10.1-2115 of the Act, § 15.1-492 also recognizes the vested rights of property owners by limiting the application of local zoning ordinances to existing uses. There is no specific statutory language, however, that establishes at what point in the development process a developer acquires a vested right to complete a project, despite an intervening zoning or other legislative change.

"[T]he mere purchase of land does not create a right to rely on existing zoning." *Vienna Council v. Kohler*, 218 Va. 966, 976, 244 S.E.2d 542, 548 (1978). The recordation of a subdivision plat or the dedication of a right-of-way, standing alone, generally is not sufficient to establish a vested right in a contemplated use of land. I & 4 R. Anderson, *American Law of Zoning* 3d 99 6.22, 25.23 (1986 & Cum. Supp. 1988); 8A E. McQuillin, *The Law of Municipal Corporation* 3 9 25.188 (3d ed 1986). Once an owner "has obtained a permit valid under existing zoning and in good faith incurs substantial obligations in reliance thereon, his rights to complete the project are generally protected against subsequent zoning amendments." @ 7 P. Rohan, *Zoning and Land Use Control* 1; 52.08[41, at 52-83 (1989). This determination should be made on a case-by-case basis. I R. Anderson, *supra* 9 6.23. The right to complete a development generally refers to the extent of development covered by the permit. *Compare Aveo Com. Developer v. South Coast*, 17 Cal. 3d 785, 132 Cal. Rptr. 336, 389, 553 P.2d 546, 550 (1976) [hereinafter "Avco").

If other conditions in the permit process have been met, obtaining a valid building permit usually entitles the permittee to complete a building pursuant to the permit

within a specified time without having to comply with subsequent zoning changes. See *Fairfax County v. Medical Structures*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972); *Chapel Creek, Ltd. v. Mathews County*, 12 Va. Cir. 350, 353-54 (1988); *Aveo*, supra.

These general rules have been modified in Virginia by two cases that place more emphasis on good faith expenditures to complete government approved projects, even though no permit for the construction has yet been issued. The Supreme Court of Virginia has recognized that

in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process. Every site plan submitted under the Fairfax County Zoning Ordinance (Chapter 30, Code of Fairfax County) must contain, among other things, topographical maps, surveys, engineering studies and proof of notice to landowners, in the vicinity. The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will be issued.

Fairfax County v. Medical Structure?, 213 Va. at 357-58, 192 S.E.2d at 801. In the *Medical Structures* case, the owner had obtained a special use permit under an existing zoning classification, filed and diligently pursued a bona fide site plan, and incurred substantial expense in good faith before a change in the local zoning ordinance. The Supreme Court held under these facts that the Permittee had "a vested right to the land use described in the use permit and he cannot be deprived of such use by subsequent legislation." Id. at 358, 192 S.E.2d at 801.

The Supreme Court also has held that a vested right existed when an oil company, after the issuance of a special use permit under existing zoning, purchased certain property based upon its value for the permitted use. *Fairfax County V. Citic-Service*, 213 Va. 359, 193 S.E.2d 1 (1972). The company had filed a preliminary site plan after a zoning amendment that would have restricted the development had been advertised, but before it was adopted. The Supreme Court held "that [the company's] right to the land use described in the use permit vested upon the filing of the site plan." Id. at 362, 193 S.E.2d at 3.

The question presented by your inquiry, therefore, is whether the owner has obtained the requisite government approvals for his project, and has incurred sufficient expense in good faith reliance on those approvals, to acquire a vested right to complete the development as approved.

IV. Owner Has Vested Rights in Facts Presented

As discussed above, the existence of a vested right depends upon the specific facts in each case. See *I R. Anderson*, supra 9 6.23; *Ruell v. Town of Stephens City*, 12 Va. Cir. 180, 183 (1988). In determining when vested rights accrue, it is important to note that different localities control their land use and development in different ways throughout the Commonwealth, within the scope of zoning and subdivision enabling statutes. No attempt has been made to analyze the facts you present under the requirements of any specific local ordinance.

In this instance, the owner has no building permit, no special use permit and no site plan. Nonetheless, the county rezoned the property to authorize the project for a maximum of 290 single family residences and 50 townhouses. The subdivision of the property by ten separate plats was approved by the county presumably in accordance with applicable subdivision requirements. Furthermore, the owner entered into a subdivision agreement with the county that provided that the location and construction of all improvements would be in accordance with plans approved by the county. The subdivision agreement was backed by a \$1,900,000 performance bond. Prior to the effective date of the Act, the owner expended virtually all the funds necessary to develop the property for sale as single family lots in accordance with the conditional rezoning and plats approved by the county.

The facts in this case can be compared to those in *Medical Structures*. In the facts you present, rather than a special use permit for a commercial project, the owner has secured a conditional rezoning of the property for a projected maximum of 290 single family and 50 townhouse units and a bonded subdivision agreement to construct extensive improvements in accordance with plans approved by the county. The bonded plans are certainly a monument to the owner's intention irrevocably to commit the property to the development. In fact, the actual construction of extensive infrastructure and other improvements has been completed. In *Medical Structures*, the developer expended funds to prepare a site plan. In this case, the owner has had the property rezoned and its subdivision approved, and has constructed extensive improvements. The facts you present are distinguishable from the facts considered in *Medical Structure* because of the numerous residential lots involved rather than the construction of a single commercial project. Nevertheless, significant authority supports the application of the vested rights doctrine in the facts you present.

In general,

[t]he mere filing of an approved subdivision plat does not stake out a nonconforming use of the platted land which insulates it from subsequent zoning changes. However, if the developer has proceeded and made expenditures to a substantial extent in reliance on the existing zoning and before the zoning change, he may be deemed to have established and be entitled to a nonconforming use.

82 Am. Jur. 2d *Zoning and Planning* § 168, at 672 (1976) (footnotes omitted). In *Milcrest Corp. v. Clackamas County*, 59 Or. App. 177, 650 P.2d 963, 966 (1982), the court found 'a vested right in a nonconforming use' when a developer, after his planned unit development was approved by the county, "substantially commenced the project, made substantial expenditures, acted in good faith and cannot use the development that has taken place for conforming alternative uses from which plaintiff can obtain a reasonable economic return."

In the facts you present, the owner, pursuant to county approved plans, expended substantial funds in preparing subdivided lots for single family residential use, including building the roads and installing the water and sewer lines. These improvements were completed as approved before the Act became effective and more than two years before



r

The Honorable John G. Dicks, Jr. October 19,
1989
Page 6

any regulations adopted pursuant to the Act take effect. It is my opinion, therefore, that the owner has established a vested right to use the land for the purpose approved by the county, subject to the requirement that he comply with the new requirements to the greatest extent possible. Because nonconforming uses are contrary to public policy, "they are protected only to avoid injustice and that is the limit of their protection against conformity." 8A E. McQuillin, supra 5 25.182, at 18; 3ce *id.* S 25.183. A lot large enough to contain a vegetated buffer, therefore, must have such a buffer area reserved, even though the owner has a vested right to use the parcel if the buffer requirements could not have been met.

Vested Rights Are Transferable

The right to maintain an existing use attaches to the real property itself, and "purchasers of property constituting a non-conforming use who had knowledge of the ordinance are entitled to the same rights under the ordinance as their grantors." *Sander-son v. DeKalb County Zoning Board of Appeals*, 24 111. App. 3d 107, 110, 320 N.E.2d 54, 57 (1974). The owner in the facts you present developed his land with the intention of selling residential lots. A vested right that he could not transfer to his purchaser would lose a substantial portion of its value. For the purposes of the Act, there is no difference between whether the developer or an individual owner builds a house on a particular lot. It is my opinion, therefore, that a purchaser of a developed lot from the owner generally succeeds to whatever vested property rights the owner may have. The vested rights',* whether in the present owner or in a subsequent purchaser, however, do not continue indefinitely, but must be exercised within a reasonable period of time. While the rights of the locality to change its zoning powers can be suspended for a reasonable time to allow the diligent, good faith completion of an approved development, these rights cannot be suspended indefinitely. Absent this diligent, good faith completion of the approved development within a reasonable time, the vested rights of the owner or subsequent purchaser will be lost, and the lot will become subject to the current zoning requirements. *See Dwyer v. McTygue*, 137 Misc. 2d 18, 519 N.Y.S.2d 630 (1987).

N@
-- "

With kindest regards, I am

Sincerely,

"Z@:-

Mary Sue Terry
Attorney General

6:3/54-251

